BRIEF IN SUPPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the United States Court of Appeals for the District of Columbia will be found beginning at page 18 of the Record. It has not yet been officially reported.

Jurisdiction.

The decision of the United States Court of Appeals for the District of Columbia was rendered on January 18, 1943. The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 28 U. S. C. A. Sec. 347 (a).

Question Presented

The question involved is stated in the petition, *supra.*

Specification of Errors.

The United States Court of Appeals for the District of Columbia erred in the following respects:

1. In holding that Regulation No. 7 promulgated by the appellees, which limited the size of a newspaper advertisement to a single publication not exceeding 2¼ inches by 1 inch, was valid.

2. In holding valid Regulation No. 1, promulgated by the appellees, which limited a licensed dentist to only two signs displayed or exposed to view of the general public at his office and which provided that such signs must not exceed 48 inches in length by 6 inches in width, if the sign is placed parallel to or flush with the building, or not more than 24 inches in length and 6 inches in height, if the sign is at an angle to the building.

ARGUMENT.

I.

Regulation No. 7 is an unconstitutional limitation on petitioner's right to advertise.

Regulation No. 7 [3] limits the size of any newspaper advertisement published by a licensed dentist to a single insertion in a newspaper of an ad which does not exceed 2¼ inches by 1 inch, or 2¼ square inches in area. The Dental Act of 1940 does not prohibit newspaper advertising in the manner limited by Regulation No. 7. Section 11 (h) (3) of the Act however uses broad language in declaring that unprofessional conduct for which one's license is liable to revocation or suspension may result from "Advertising by any medium other than the carrying or publishing of a modest professional card * * * which * * * shall display only the name, address, profession, office hours, telephone connections, and, if his practice is so limited, his specialty * * * The size of said cards shall be designated by the Board." This provision of the Act is the authority relied upon by the Board for the promulgation of Regulation No. 7. Accordingly, the publication by a licensed dentist of a newspaper ad 3 inches by 5 inches would constitute unprofessional conduct for which his right to practice would be subject to suspension or revocation.

It is significant to note that newspaper publication as such is not prohibited. No deleterious effect on public safety or health was considered likely to result from the

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[3] "A licensee may publish a modest professional card in the newspapers or publications of the District of Columbia. This card shall contain only such information as provided in Section 11, Paragraph h, Subdivision 3. The size of this card shall not exceed two and one-fourth inches (2¼") in with and one inch (1") in height. No more than one such card may be published in a copy of any newspaper or publication at one time."

express allowance of such publication. The question here presented is whether the limitation contained in Regulation No. 7 can be said to bear any reasonable relation to public health or safety.

In the opinion of the United States Court of Appeals for the District of Columbia, the only references to this phase of the case are contained on page 2 of the opinion (R. 19):

> "The Board * * * was specifically authorized to designate the size of cards and signs * * * The licensee is limited to a single advertisement, not to exceed two and one quarter inches in width and one inch in height, in a copy of any newspaper or publication at one time * * * The limitation on newspaper advertising is a reasonable regulation under the terms of the Act."

Nothing more is said in the opinion on the entire problem of newspaper advertising here presented. The balance of the court's opinion deals with the reasonableness of the regulations relating to the size of signs permitted on buildings in which the dental office is located.

The right to advertise in newspapers may well be subject to some limitation where limitation has relation to the content of a publication which may have an adverse effect on public health or safety. The statutory limits on the content of any advertisement published by a dentist are specified in Section 11 (h) (3) of the Act. For present purposes it is assumed that the content of the publication may be limited on public health and safety grounds. No such reason, however, is applicable to the size of such publications.

The size designated in Regulation No. 7 is unreasonably small in that it permits only a 1 inch ad one column in width. Because of the total lack of any sound relationship between the size of newspaper ads, containing concededly proper information, and public health or safety, it is re-

spectfully submitted that the limitation contravenes the due process clause of the Fifth Amendment.

II.

Regulation No. 1 which places a limitation on the size of building signs is invalid.

Regulation No. 1 appears at page 9 of the Record. Regulation No. 3 provides that the building sign or signs of a dentist shall contain only the information authorized by Section 11 (h) (3) of the Dental Act. Only two signs are permitted to be displayed for public view, neither of which is permitted to be larger than 288 square inches or 48 inches in length, if flush with the building, or larger than 144 square inches or 24 inches in length, if at an angle to the building. In either case the size of lettering is limited to 3 inches in height.

Petitioner contends that the Board was not given authority by the Dental Act to prescribe the number of signs, but only the size, and that the prescribed size is too small in the light of the physical location of petitioner's office. That the Board went beyond the authority delegated to it by the Act in prescribing the number of signs which a dentist may display is clear. The last sentence of Section 11 (h) (3) of the Act provides that "The size of said cards or signs shall be designated by the Board." The Court of Appeals stated "that the regulation dealing with size is a nullity if it permits the licensee to accomplish through multiplicious production the effect which is denied to a single display." This disposition of the question by the Court of Appeals is not believed to be a proper solution. The fact is that the Board was authorized by the Act to adopt a regulation as to size. If it was intended that it should also have the authority to determine the number of signs, that could have been clearly provided for in the Act.

In connection with another aspect of the size of signs, the Court of Appeals said, at page 5 of its opinion (R. 22), "that had Congress inflicted upon the Board the task of determining the size of each individual advertisement, based upon the particular location of and the condition surrounding an office, it would have been stated in clear terms." To the same extent, it is submitted, if Congress intended the Board to designate the number of signs, that could also have been clearly stated. It does not follow that the failure to so state means that the word "size" means "aggregate size." This assumes that one could post five signs, each being 1/5 of the total allowed square area. But this assumption is not correct because more than two signs are prohibited, irrespective of size. In all deference to the Court of Appeals, it is urged that, apart from the reasonableness of the regulation as to size, the limitation as to number is clearly invalid and the courts below should have so held. The trial court did make a general finding that the size of the signs was reasonable (R. 15). No finding was made that the size of the signs maintained by the petitioner was not reasonable. The regulations make no distinction between the locality in which the dental office is located, the size of the building, or the nature of the obstructions to the view thereof. The size fixed by the regulation is thus arbitrary and not related to the needs of the particular case. The Court of Appeals opinion recognized this, but said that there is nothing in the Act to require the Board to consider each licensee separately and "if a general dimensional regulation of this character is reasonable, if it substantially effectuates the purpose of an Act designed to promote the public health and safety, it cannot be considered to contravene the guarantees of the Fifth Amendment." That dimensional regulation of signs, such as are involved in the case at bar, is directly related to public health and safety is a proposition which is as-

sumed but not supported by reason or authority. The long line of cases limiting the size of billboards are authoritative only insofar as they hold that large physical structures of a temporary nature may constitute dangers to public safety. But in that line of cases it is clear that limitation of the size of billboards applies to all billboards, irrespective of whose advertising is displayed. The general application of such dimensional limitations are clearly based on public safety considerations. The limitation in the case at bar, it is respectfully urged, is sought to be justified as a public safety measure when in fact public safety is not a moving consideration to any extent. Larger signs may be maintained on the same building by one who is not a dentist, than those which the dentist is permitted to maintain. The attempted justification of the limitation of size on public safety grounds fails. The only basis remaining is the alleged relationship of the size of signs to public health as an instrument in controlling the various activities incident to the practice of dentistry. No relationship between the two exists in the case at bar.

A statute is invalid if its purported regulation bears no reasonable relationship to some public interest it seeks to protect.

Smith v. *Texas*, 233 U. S. 630, 58 L. Ed. 1129;
In re Wilshire, 103 F. 620.

III.

Petitioner's right to engage in truthful advertising was erroneously held by the court below to be governed by the decision of this Court in Semler v. Oregon State Board of Dental Examiners, 294 U. S. 608, 79 L. Ed. 1086.

The case at bar presents a need for reexamination of the decision in *Semler* v. *Oregon State Board of Dental Examiners, supra,* insofar as the principle of that case was

applied to the case at bar by the trial court and the Court of Appeals. The Dental Act of 1940 was largely patterned after the Oregon statute involved in that case. That case involved advertising by a dentist of (a) professional superiority, (b) prices, (c) free examinations, (d) guaranteed dental work, and (e) painless dentistry. Although some of these propositions were urged in the trial of the case at bar, the points finally relied upon by the petitioner in the trial court and the principle points submitted in the Court of Appeals related to the same points now urged on this appeal, namely, petitioner's right to publish in newspapers the information permitted by the statute by single publications larger than 2¼ inches by 1 inch and his right to maintain the signs on the building where his office is located.

It is submitted that the questions presented to the Court of Appeals were not decided in the *Semler* case, although that case was held to be authoritative in the present case.

The concept that the public interest is adversely affected by the type of advertising prohibited by the decision in the *Semler* case is not here being questioned.

The error in the present case lies in holding that the publication of one's *name, address, profession, office hours, telephone connections* and *specialty,* each of which is expressly permitted by the statute, can not have an adverse effect on public health or safety when such publication is in an ad of the permitted size, 2¼ inches by 1 inch but can have such effect in an ad five times that size. The ratio decidendi of the *Semler* case was that professional boasting, even if truthful, would tend "to lure the credulous and ignorant members of the public to their (dental) offices for the purpose of fleecing them," which is also characterized as "bait advertising." There is a clear relationship between that type of advertising and the public in-

terest, but none between permitted advertising of a limited size and the same advertising of a larger size.

The opinion of the Court of Appeals, at page 3 (R. 20), draws as a "near analogy" to cases involving regulation of the size of billboards. The analogy is none too clear for the reason that in the billboard cases the regulation of size is justified by public safety considerations, in that a billboard that is too large is per se a danger to the public. In no case which has been found has the size of the billboard been limited by any consideration of regulation of the business of the advertisers. Regulating the size of billboards would be analogous to regulating the size of newspapers in which ads are published, if any public safety factor existed in connection with the size of a newspaper.

Petitioner submits that no public interest is affected by the size of the permitted type of advertising. The fact that an association of dentists in the District of Columbia has considered it desirable to limit the size of that type of advertising, which is neither "bait advertising" nor characteristic of the conduct of the charlatan, and thus incorporated such principle into the regulations governing the practice of dentistry, is no justification therefor. The adoption of a principle of so-called professional ethics may itself amount to a deprivation of due process of law and, in fact, may be illegal. In the recent case of *American Medical Association* v. *U. S.*, decided by this Court on January 18, 1943, 87 L. Ed. 348, 350, this Court said that the plan of operation adopted by the Group Health Association, "was contrary to the code of ethics of the petitioners." In that case, that which a learned profession had announced to be one of its ethical standards was held to result in a criminal conspiracy.

The *Semler* case is, therefore, not believed to be authoritative in the circumstances of the present case and was wrongly relied upon below.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the questions presented herein require review of the decision of the United States Court of Appeals for the District of Columbia and, accordingly, a writ of certiorari should issue as prayed for in the petition.

Respectfully submitted,

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